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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 448.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

vs.

SUNFIRE COAL COMPANY, a Corporation, and
ASHLO COAL COMPANY, a Corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents Sunfire Coal Company and Ashlo Coal Company in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTION PRESENTED.

In private litigation wherein plaintiffs have recovered a money judgment in a tort action, and defendant's pending appeal in a Court of Appeals involves only defendant's contention that its motion to vacate the judgment and grant it a new trial, based upon newly discovered evidence, was erroneously denied by the trial court as being barred by the time limitation imposed in Rule 60(b), Federal Rules

of Civil Procedure, is "the case of such imperative public importance as to justify a deviation from normal appellate processes" pursuant to Rule 20 of this Court?

STATEMENT OF THE CASE.

In view of the fragmentary portion of the record which is here certified, respondents challenge the propriety of that portion of the petitioner's statement of the case designated as "The Motion to Vacate," wherein petitioner undertakes to present a factual background based upon items gleaned from its own unverified motion, from the affidavit of one of its representatives, the affidavit of one of its attorneys, and the patently hearsay affidavit of one Ira Kilburn. As indicative of the impropriety of this technique, in the opinion of respondents, are the following:

1. A statement which appears on page 4 of the Petition for Writ of Certiorari, typical of similar repetitions throughout the Petition, to the effect that the trial court permitted the introduction of evidence concerning "shootings, of the burning of the Ashlo tipple, and of the destruction of other coal operators' properties by burning and dynamitings without requiring plaintiffs to show who had committed such acts and *without proving UMW was in anywise connected therewith or was responsible therefor* (5a)." This statement is reasonably calculated to lead to a false assumption. As stated on page 12, of the Petition, the Court of Appeals briefly remarked that there was circumstantial evidence claimed by respondents to support their contention that the Ashlo tipple was deliberately burned by or at the instigation of the petitioner. This circumstantial evidence was obviously sufficiently persuasive to convince the jury

that tried the case. It was obviously sufficient to persuade both the district court and the appellate court that the jury's verdict was supported by the evidence. To give the impression that there was no evidence whatever "in anywise" connecting the petitioner with the destruction of the respondents' tipple is entirely misleading, but since that portion of the record is not here certified, the respondents are unable to point out to the Court those items of evidence which strongly indicated the implication of the petitioner's members, agents and representatives.

2. Any indication that the disorders described in the Kilburn affidavit (8a-10a)* were closely linked with depredations described in the evidence upon the trial of this case is likewise misleading. Of all the occurrences described in the alleged Kilburn affidavit, only one was even mentioned in the evidence produced on the trial, and that was the testimony of Marion Richey, one of several witnesses who testified concerning widespread destruction of mining properties and equipment in the area, to the effect that three of his tipples were destryoed by fire, and he could not say who burned them.

3. It is worth noting that Kilburn's statement of his fear for his life is immediately followed (9a) by his statement that threats had been made by George Smith and R. D. Cisco, fellow police officers accused of misconduct in Kilburn's affidavit. Neither of these persons had anything to do with the trial of this case, nor were they ever mentioned throughout the trial.

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* Respondents have adopted petitioner's reference system. When the page-number numeral precedes the small "a," reference is made to that portion of the record described by petitioner as the "appendix record."

4. It is further to be noted that Kilburn's affidavit was allegedly filed in some entirely unrelated proceeding before the Board of Commissioners of Hazard, Kentucky (12a), and he has made no affidavit in this proceeding, nor does anyone represent that he would substantiate in evidence the matter contained in his alleged affidavit. The petitioner merely says that, if granted a new trial, it intends to subpoena Kilburn as a witness, and there examine him concerning the statements in his affidavit.

Any inferences in the petitioner's statement of the case to the effect that the respondents have conceded, or that the trial court has determined that the proffered material appearing in Kilburn's affidavit would be admissible upon a new trial, or would be highly pertinent, or would have a decisive effect upon the final judgment, are, in the opinion of respondents, completely unjustified. The inaccuracy of such inferences is at least partially demonstrated by a reading of the entire memorandum of the trial court (3a, *et seq.*), and by reference to the complete response to the original motion of petitioner (13a-14a).

It is felt that the introductory part of the memorandum of the trial court (altered only to insert appropriate dates) states the case fully and with brevity, thus (15a-16a):

> "The plaintiffs brought this action to recover for damages inflicted on their property through the wrongful conduct of certain employees and agents of the United Mine Workers of America (hereafter UMW) in the course of the coal strike in the spring of 1959. The court entered judgment for the plaintiffs on June 7, 1961 and on June 27, 1961, overruled motions by the defendant for judgment or, in the alternative, for a new trial. On May 16, 1963, defendant

filed a motion in this Court to vacate the judgment and for a new trial based on newly discovered evidence.

"Attached to the motion is an affidavit by a police officer from Hazard, Kentucky to the effect that certain acts of violence supposed to have been perpetrated by UMW agents were actually committed by persons having no connection with the UMW. The defendant maintains that such evidence would compel findings different from those already made because the court has relied upon circumstantial evidence to connect the damage to the plaintiffs' property and the conduct of the defendant's agents, not upon specific identification of the wrongdoers.

"Defendant cites Rule 60(b)(6), F. R. C. P. as the basis for its motion. Rule 60(b) provides that a court may relieve a party from the operation of a final judgment in five enumerated situations, one of which entails newly discovered evidence, and under a sixth subdivision which is a broadly worded catchall to cover situations not embraced in the preceding five subdivisions. The present question stems from the fact that the rule prescribes a one-year time limit for opening a judgment for newly discovered evidence, while there is no definite time limit on the sixth subdivision, the one on which defendant relies."

THE ARGUMENT.

While the petitioner is asking this Court to issue a writ of certiorari before judgment by the Court of Appeals for the Sixth Circuit, under the provisions of Rule 20 which permits the granting of a writ under such circumstances "only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this Court," no attempt is made by the petitioner, in the reasons stated in its petition for granting the writ, to demonstrate to the Court why this case falls within this exception of being one "of such imperative public importance" that it cannot await the orderly procedures established for appeal in the federal judicial system. Whether, in fact, it is such a case is the immediate question before the Court.

Shorn of such sensationalism and emotionalism as may be inherent in a detailed statement of factual background, regardless of whether fairly or unfairly presented, the precise ultimate question in this case is whether or not the petitioner's motion for new trial is barred by the one-year limitation stipulated in Rule 60(b).

That the petitioner's motion for new trial is based upon newly discovered evidence cannot possibly be denied. Its own description of its motion (4a) is: "Motion to vacate final judgment and order and award defendant United Mine Workers of America a new trial because of newly discovered evidence."

That this is a motion for a new trial based upon newly discovered evidence of the character described in Rule 60(b) is likewise completely beyond debate. The petitioner (then the moving party) thus stated to the trial court (5a):

"Pursuant to Rule 60(b), Federal Rules of Civil Procedure, UMW moves this Honorable Court to vacate and set aside the final judgment entered by this Court in the captioned case against defendant UMW on the 7th day of June, 1961, as well as its order dated the 27th day of June, 1961 and entered on the 28th day of June, 1961, denying UMW's Motion for Judgment in Accordance with Motions for Directed Verdict or for a New Trial, and to grant said defendant UMW a new trial based upon newly discovered evidence."

In final analysis, the petitioner is here saying that its motion, filed too late as a motion under subsection (2) of Rule 60(b), specifically dealing with newly discovered evidence, should be allowed under subsection (6) because (a) it feels that the anticipated new evidence would be highly significant in a trial where one of the elements of circumstantial evidence was a showing of a general pattern of property damage and violence, and (b) because it did not learn of the existence of such evidence until after the expiration of one year following the judgment.

To state their position abruptly, it is the contention of the respondents that, since this motion is obviously based upon newly discovered evidence which does not involve any element of misconduct or over-reaching on the part of the respondents, the motion is barred by the express limitation appearing in the rule regardless of how significant or persuasive the newly discovered evidence may actually be (assuming that it is available), and it is also barred regardless of the fact that the moving party could not have learned sooner of the availability of such evidence (assuming such fact to be true).

The authorities on this point are entirely clear and entirely in accord. In *Klapprott v. United States*, 335 U. S. 601, the Court was considering a case where a

naturalized citizen had been deprived of his citizenship upon a default judgment, rendered without the production of any evidence, and for some four years had been incarcerated and so harassed by governmental authorities as to make it virtually impossible for him to devote any attention to the defense of the denaturalization proceedings, or to seek any relief therefrom. The case arose upon his motion to vacate the default judgment. Among other things, the Government contended that his motion was based upon "excusable neglect," that a motion on such ground fell under subsection (1) of Rule 60(b), and that Klapprott was barred by the one-year limitation stated in Rule 60(b). This Court, however, pointed out that Klapprott's dereliction arose from circumstances which could not be rationally classified as "neglect." On the contrary, the Court pointed out, in substance, that Klapprott's very adversary in the denaturalization proceeding, and the very adversary who had taken a default judgment against him, by other and extraneous tactics of questionable propriety had made it virtually impossible for him to defend himself or to seek earlier relief in the denaturalization case. This was not a case of "neglect," the Court said, but fairly fell within the " 'other reason' clause of 60(b), to which the one-year limitation provision does not apply." [335 U. S. 614.] At the same time, however, the Court made it equally clear that, had the motion been based upon facts encompassed in the term "excusable neglect," the one-year period would have been inflexibly applied. It was said:

> "And of course, the one year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b)." [335 U. S. 613.]

Petitioner's incomplete quotation, inferring that the Court had indicated that the above rule should be relaxed whenever "appropriate to accomplish justice" does not convey the Court's true declaration. What the Court said, with our emphasis supplied, was: "In simple English, the language of the 'other reason' clause, *for all reasons except the five particularly specified*, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." [335 U. S. 614-615.]

In *United States v. Karahalias*, 205 F. 2d 331, Judge Learned Hand, first agreed with the petitioner's present contention regarding the availability of subsection (6) "to provide for situations of extreme hardship, not only those, if there be any, that subsections (1), (2) and (3) do not cover, but those that they do." However, upon a re-reading of this Court's opinion in the *Klapprott* case Judge Hand decided that his original interpretation was entirely in error, and that this Court had declared "that subsection (6) did not toll the limitation of the Rule upon any kind of 'neglect,' whatever the excuse might be." Petitioner quotes briefly from this case, choosing to emphasize what it calls "the importance of petitioner's time of being informed." The key words in this sentence, and those upon which the decision turn, in respondents' opinion, should be thus emphasized. "Therefore, we hold as before that if Karahalias can prove that *he was prevented* from returning to the United States from the time he learned of the action to cancel his citizenship the judgment must be opened." Manifestly the court was not primarily concerned with time, but rather with prevention, and that prevention would have no significance until the litigant was informed of a development requiring action which he was prevented from taking.

From *Radack v. Norwegian American Line Agency, Inc.*, 2 Cir., 318 F. 2d 538, the petitioner deduces that the Second Circuit Court of Appeals has enunciated a principle to the effect that Rule 60(b)(6) confers such a "grand reservoir of equitable power to do justice in a particular case" that the limitations imposed upon subsection (2) motions may be overlooked in any instance where the court feels it must do "justice." Respondents do not so interpret this case. In that case suit had been dismissed for lack of prosecution. Some fifteen months later, learning of the dismissal, plaintiffs moved to vacate the order of dismissal. It was contended that the motion fell under subsection (1) of Rule 60 (b), and was therefore barred. However, the court pointed out that, in violation of Rule 77(d) F. R. C. P., no notice had been given of the entry of the dismissal, and that the practice and rules of the trial court were at variance with the official Rules. The court decided that, since the party had been denied a right specifically conferred by law, a reopening of the case under Rule 60(b)(6) was proper. To illustrate that the petitioner's interpretation of this opinion cannot be successfully maintained, reference can be made to *Costa v. Chapkines*, 316 F. 2d 541. That case was in the same court (United States Court of Appeals, Second Circuit), involved the same type of procedure (motion to vacate dismissal of plaintiffs' action for want of prosecution), and was before the same identical judges. However, it did not involve a failure to give notice under Rule 77(d) F. R. C. P. In the *Costa* case, appellant's motion, made more than a year after dismissal of the action, was based upon the allegation that their attorney had been seriously ill and had died. In such a case the court said:

> "Their motion must be read as coming clearly within subdivision (1) of the Rule 60(b). Fed. R.

Civ. Pro., providing for relief from judgment in cases of "[M]istake, inadvertence, surprise, or excusable neglect." As such, the motion made over one year after judgment was untimely. When the grounds for relief fall within subdivisions (1), (2) or (3) of Rule 60(b), the Court is restricted by the one-year limitation and cannot grant relief under subdivision (6) which allows motions to be made within a reasonable time."

In *Moore's Federal Practice*, Volume 7, page 321, it is said:

> "This maximum period of one year is not subject to enlargement by the court; and may not properly be circumvented by a utilization of any of the other clauses, (4), (5), or (6), which are subject only to a reasonable time limitation, where the reason for relief is embraced within clauses (1), (2), or (3)."

Again, in the same volume, page 295, it is made clear that sub-clause (6) should not be used to extend the time limitation applicable to clauses (1), (2) and (3):

> "In reference to the first qualification, the very cast of the Rule and the language of clause (6) indicate that this residual clause is dealing with matter not covered in the preceding five clauses. Further the maximum time limitation of one year that applies to clauses (1), (2) and (3) would be meaningless, if after the year period had run the movant could be granted relief under clause (6) for reasons covered by clauses (1), (2) and (3)."

In *Barron & Holtzoff*, Volume 3, Federal Practice and Procedure, page 421, it is said:

> "A motion under clauses (1), (2) or (3) must be denied as untimely if made more than one year after judgment regardless of whether the delay was reasonable."

The principles expounded in these well-regarded texts are fully in accord with this Court's pronouncements in the *Klapprott* case, and so far as respondents have been able to discover, there are no authorities to the contrary.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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